

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SYNGENTA CROP PROTECTION, LLC

Plaintiff

vs.

CIVIL ACTION NO:

WILLOWOOD, LLC, et al.

1:15-CV-274

Defendants

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ATTORNEY'S EYE'S ONLY

The Videodeposition of JOSEPH M.D.

FORTUNAK, Ph.D. was held on Monday, October 10, 2016,
commencing at 9:00 a.m., at Kirkland & Ellis, LLP, 655
15th Street, N.W., Suite 1200, Washington D.C. 20005,
before Christina Essi Pagano, Notary Public.

Reported By: Christina Essi Pagano, RPR

1 Q And that would teach away from the
2 combining them all together, correct?

3 A It would teach away from combining them
4 together or from the use of methoxide ion --

5 Q Okay.

6 A -- in that esterification step.

7 MR. TILLER: Why don't we take a quick
8 break.

9 VIDEOGRAPHER: We're now going off the
10 record. The time 3:03.

11 (There was a recess taken.)

12 VIDEOGRAPHER: We are now back on the
13 record. The time is 3:20.

14 MR. TILLER: Doctor, thank you. I have no
15 further questions.

16 CROSS EXAMINATION BY MS. BALTZER:

17 Q Dr. Fortunak, I'm going to ask you some
18 questions in followup to the questioning that
19 Mr. Tiller did today.

20 You mentioned earlier that, in response to
21 Mr. Tiller's questioning, that the presence of DABCO

1 related impurities indicated that DABCO found Azoxy 2SC
2 came from azoxystrobin technical as opposed to other
3 ingredients that were in Azoxy 2SC. Do you remember
4 that?

5 A Yes, I do.

6 Q And what is the significance of the
7 presence of DABCO related impurities that was found in
8 Azoxy 2SC?

9 A Well, there could always be a bit of a kind
10 of a -- kind of a miniscule worry about, did DABCO
11 somehow get into this from the other ingredients that
12 went into the Azoxy 2SC. And looking at those
13 ingredients, it's really -- the likelihood is very,
14 very small. It's -- but if we actually look at DABCO
15 plus the two related impurities, what we see is that
16 the DABCO reacted with one of the partners, one of the
17 reacting molecules that otherwise would've undergone
18 the condensation step to make azoxystrobin. And so if
19 that's the case, then we would have to say that both
20 the DABCO and an intermediate were making azoxystrobin,
21 was present in one of the -- in some of the adjuvants

1 somehow, and that is -- that's so unlikely that it's
2 essentially, vanishingly possible.

3 Q So the testing that you reviewed that
4 Syngenta did, finding that there were these DABCO
5 related impurities in Willowood's Azoxy 2SC, what did
6 that -- how did that inform your analysis of whether
7 Willowood practices the '761 patent?

8 A Well, it reinforces the idea that DABCO is
9 present because it shows us that the DABCO that was
10 present was present at the time when azoxystrobin was
11 actually being synthesized.

12 Q And in what part of the Azoxy 2SC would
13 that DABCO have been found in?

14 A In the final stage that we've all agreed is
15 the condensation step.

16 Q What molecule within Azoxy 2SC would that
17 DABCO have been found in, based on the fact that there
18 were DABCO related impurities found in Azoxy 2SC?

19 A Okay. It would react with intermediates
20 when you're in the final stage. The stage, I think
21 it's probably called stage four, that condensation

1 stage when azoxystrobin itself is formed.

2 Q And so in the final product after it was
3 formulated into Azoxy 2SC, what part of that Azoxy 2SC
4 would the DABCO have come from, based on the fact that
5 there were DABCO related impurities in the Azoxy 2SC?

6 A From the azoxystrobin technical.

7 Q You talked with Mr. Tiller a little earlier
8 about the Weintritt reference; do you remember that?

9 A Yes.

10 Q Have you made any legal determinations as
11 to whether the Weintritt references prior art?

12 MR. TILLER: Objection.

13 THE WITNESS: No. I'm not a legal expert.

14 BY MS. BALTZER:

15 Q When you were discussing Weintritt in your
16 rebuttal expert report, why did you refer to the
17 examples in Weintritt?

18 A So it's the difference between a patent
19 that's directed towards making compounds for a specific
20 purpose, for instance, for testing. If you want to
21 make a lot of different compounds and that's your